Civil Procedure which provides: "Costs may be allowed or not, and if allowed may be apportioned between the parties on the same or adverse sides, in the discretion of the court." The cases above cited have held, however, that as the constitution provides that private property shall not be taken for public use without just compensation being first made,[8] the landowner cannot be required to pay either his adversary's or his own costs, for to do so would be to reduce by that amount the compensation awarded him at the trial, and so be an infringement of the constitutional guarantee. The tendency of the courts of other jurisdictions seems to be towards the adoption of this rule.[9] Its justice is apparent, for the owner, being entitled to just compensation for the property which is taken from him, is entitled to have the amount of that compensation determined when the parties cannot agree upon it. The expense to which he is put is, therefore, necessary and proper, and should be borne by the party who forced him to incur it.[10] The condemning party would seem to be amply protected from frivolous appeals. and costs improperly incurred by the power of the court to determine what are proper items of costs and to disallow such as are improper.[11]

B. B. B.

Evidence: Statements of Deceased Person Against Interest.—The United States Supreme Court, speaking through Mr. Justice Pitney, holds, in Donnelly v. United States,[1] that the trial court properly excluded statements of a deceased person despite the fact that the statements imposed upon the declarant a criminal liability for murder. That the hearsay exception as to deceased person's declarations against interest extends only to declarations against proprietary or pecuniary interest and not to declarations against personal interest in general was definitely settled in England by the House of Lords in 1844,[2] and the limitation set by that case has been adopted by most of the American authorities.[3] Despite the long line of American

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[8] Constitution of California, Art. I, section 14.

[9] Peoria B. & C. Traction Co. v. Vance (1911) 251 Ill. 263, 95 N. E. 1081; Dolores No. 2 Land and Canal Co. v. Hartman (1892) 17 Colo. 138, 29 Pac. 378; Petersburg School District v. Peterson (1905) 14 N. D. 344, 103 N. W. 756; Grays Harbor Boom Co. v. Lownsdale (1909) 54 Wash. 83; 104 Pac. 267; Stolze v. Milwaukee & L. W. R. Co. (1902) 113 Wis. 44, 88 N. W. 919.

[10] Lewis on Eminent Domain, 3rd Ed. sec. 812.

[11] San Francisco v. Collins, supra.

[1] 33 Supreme Court Reporter, 451, (Decided Apr. 7, 1913).

[2] Sussex Peerage Case, (1844) 11 Cl. & F. 109.

[3] A note on p. 460 of the Supreme Court Reporter cites forty-three cases, including People v. Hall, (1892) 94 Cal. 595, 599, 30 Pac 7. See also, Jones on Evidence, sec. 324, note 78.

cases which have regarded the rule as well settled, a dissenting opinion was filed by Mr. Justice Holmes, with whom concurred Mr. Justice Lurton and Mr. Justice Hughes, in the case under comment. The author of the dissenting opinion urges that, "No statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations which would be let in to hang a man," and that since "the rules of evidence in the main are based on experience, logic and common sense," there is no reason why a rule in conflict with all of these should not be repudiated. The opinion of the dissenting justices is in sympathy with the modern tendency to look to the living principles of the law of evidence rather than to the rules of thumb in which courts have attempted to state the principles in some of their applications. It supports Professor Wigmore's protest against the limitation of the exception to proprietary or pecuniary interest, which he characterizes as a "barbarous doctrine."[4]

The answer of the majority to Mr. Justice Holmes' view is stated in a quotation from Chief Justice Marshall. "Hearsay evidence is in its own nature inadmissible. . . . . The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule."[5] But a statement of the dangers of hearsay does not touch the essential contention of the dissenting judges. Underlying all exceptions to the hearsay rule are two elements,—necessity and a guaranty of trustworthiness.[6] In the case at bar the necessity is found in the death of the declarant; the guaranty of trustworthiness in the fact that the confession of the murder subjected the declarant to criminal liability. In indiscriminately rejecting the "confession of the avowed culprit," the limitation of the rule in its practical results will frequently work injustice. The dissenting opinion is significant in pointing out the necessity and importance of looking to the broad and fundamental principles of exclusion and admission.

C. S. J.

Executors and Administrators: Right of Non-Resident Executor to Nominate.—The question of the right of the probate court to grant letters of administration to the nominee of a non-resident executor in preference to the public administrator, has been one of no little uncertainty and confusion in view both of the sections of the Code of Civil

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[4] 2 Wigmore on Evidence, secs. 1476, 1477.

[5] Queen v. Hepburn, (1813) 7 Cranch 290.

[6] 2 Wigmore on Evidence, secs. 1420-1423.